Florida Law Review

Volume 62 | Issue 2 Article 8

April 2010

# Adjudicators, Not Legislators: Eleventh Circuit Declines Opportunity to "Breathe Further Life" Into § 212(C) Deportation Relief De la Rosa v. U.S. Attorney General

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# ADJUDICATORS, NOT LEGISLATORS: ELEVENTH CIRCUIT DECLINES OPPORTUNITY TO "BREATHE FURTHER LIFE" INTO § 212(c) DEPORTATION RELIEF

*De la Rosa v. U.S. Attorney General*, 579 F.3d 1327 (11th Cir. 2009) (per curiam)

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As a boy, De la Rosa had come to the United States from the Dominican Republic in search of a better life.[1] Over the next twenty years, he built that life.[2] Now, as a man, he asked for only one thing–the opportunity to stay.[3]

De la Rosa' s troubles began in 1995 when, as a twenty-two-year-old,[4] he pled nolo contendere to charges of committing a lewd act upon a child under the age of sixteen–an aggravated felony.[5] Besides the usual criminal consequences, his conviction had a critical effect: it rendered De la Rosa a removable alien, subject to deportation at any time.[6] For over a decade, the

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* J.D. Expected 2010, University of Florida Levin College of Law; B.A. in journalism, University of Central Florida. I would like to thank Professor Lea Johnston for never failing to have the right answer and Professor Michael Seigel for giving me the opportunity to make some great friends. I would also like to thank my wonderful Natalie for being my better half. Finally, I would like to thank my mother. I would not be the man I am today without your love, patience and guidance. You inspire me every day. I hope I can continue to make you proud.

1. Press Release, U.S. Immigration and Customs Enforcement (ICE), ICE Fugitive Operations Teams Arrest More Than 45 Fugitives and Immigration Violators in Orange and Palm Beach Counties (Aug. 25, 2008), *available at* http://www.ice.gov/pi/nr/0808/080825miami.htm. De la Rosa had lived in the United States since 1989 when he emigrated from the Dominican Republic. *Id.*

2. *See* De la Rosa v. U.S. Att'y Gen., 579 F.3d 1327, 1328 (11th Cir. 2009) (per curiam).

3. *Id*.

4. *Id.*

5. *Id.* At the time of De la Rosa's conviction, Fla. Stat. § 800.04(3) (1993) stated:

> A person who:
> (1) Handles, fondles, or assaults any child under the age of 16 years in a lewd, lascivious, or indecent manner;
> (2) Commits actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, actual lewd exhibition of the genitals, or any act or conduct which simulates that sexual battery is being or will be committed upon any child under the age of 16 years or forces or entices the child to commit any such act;
> (3) Commits an act defined as sexual battery under s. 794.011(1)(h) upon any child under the age of 16 years; or
> (4) Knowingly commits any lewd or lascivious act in the presence of any child under the age of 16 years, without committing the crime of sexual battery, commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. Neither the victim's lack of chastity nor the victim's consent is a defense to the crime proscribed by this section. A mother's breastfeeding of her baby does not under any circumstance violate this section.

6. *De la Rosa*, 579 F.3d at 1328. *See generally* Natalie Liem, Note, *Mean What You Say, Say What You Mean: Defining the Aggravated Felony Deportation Grounds to Target More than*

government never exercised this option.[7] In 2007, however, De la Rosa' s free pass came to an end.[8] As part of a concerted crack down on deportable aliens,[9] immigration officials, citing De la Rosa' s conviction, ordered De la Rosa to show cause as to why he should not be immediately deported.[10] Appearing before an immigration judge, De la Rosa sought the only relief available to him–a "§ 212(c) waiver" of deportation.[11]

An individual seeking a § 212(c) waiver does not contest his deportability,[12] but must, in fact,concede his deportability at the outset.[13] Eligibility further depends on whether the individual can demonstrate that he satisfies specific statutory criteria. Notably, this includes demonstrating that the basis for his deportation has a statutory counterpart in 8 U.S.C. § 1182(a), which describes those conditions that render aliens seeking entry into the United States inadmissible.[14] Notably, even if determined eligible, an applicant is by no means guaranteed relief. He must still throw himself at the mercy of the Attorney General, which is exercised by immigration judges and the Board of Immigration Appeals (BIA),[15] and

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*Aggravated Felons*, 59 FLA. L. REV. 1071 (2007) (discussing generally the varying effects of such convictions on an alien's immigration status).

7. *See* Press Release, *supra* note 1.

8. *Id.*

9. Jason Schultz, *Immigration Sweep Nets 44 Targeted for Deportation*, PALM BEACH POST, Aug. 25, 2008. ICE arrested De la Rosa as a part of its Fugitive Operations Program, which "was established in 2003 to eliminate the nation's backlog of immigration fugitives and ensure that deportation orders handed down by immigration judges are enforced." *Id.*

10. *De la Rosa*, 579 F.3d at 1328. *See generally* Stephen Yale-Loehr & Lindsay Schoonmaker, *Overview of U.S. Immigration Law, 1.13.2 Removal Procedures*, 1727 PLI/Corp 73 (2009) ("All removal proceedings begin with a notice to appear. This is similar to the old orders to show cause. The notice to appear indicates the reasons the government believes the foreign national is inadmissible or deportable, and the time and place of hearing before an immigration judge.").

11. INA § 212 (c), 8 U.S.C. § 1182 (c) (1994) (repealed 1996). The section provided in pertinent part that:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

*Id.* In effect, the § 212(c) waiver allowed the Attorney General to waive what would otherwise amount to automatic denials of readmission into the United States. *See id.*

12. 8 C.F.R. § 1003.44 (2008).

13. *Id.*

14. *Id.*; *see* 8 C.F.R. § 1212.3(e) (2008).

15. The BIA wields appellate jurisdiction and also operates as a court of final appeal over nearly all matters, except those referred to the Attorney General. 8 C.F.R. § 1003.1(b) (2009).

ask for a discretionary waiver of deportation.[16]

For De la Rosa, even that opportunity would not be forthcoming.[17] The government moved to "pretermit"[18] De la Rosa's application for relief, arguing that the category of his aggravated felony conviction rendered him ineligible for a waiver.[19] The immigration judge agreed and ordered De la Rosa removed from the United States.[20] De la Rosa appealed to the BIA.[21] He argued that his conviction did not disqualify him from a § 212(c) waiver, because "his aggravated felony conviction constituted a 'crime involving moral turpitude' "—a category of convictions eligible for waiver pursuant to § 1182(a).[22] The BIA was not persuaded.[23] It concluded that the proper test for eligibility was whether the *category* of De la Rosa's actual charge—sexual abuse of a minor[24]—had a statutory counterpart in § 1182(a).[25] It refused to consider whether any aspect of his underlying crime could have been charged in a manner entitling him to relief and dismissed his claim.[26]

De la Rosa appealed yet again, this time to the Eleventh Circuit Court of Appeals.[27] He reiterated his complaint that immigration courts erred by focusing strictly on the category of his charged offense rather than considering whether his *underlying crime* could be considered a crime involving moral turpitude.[28] Analyzing De la Rosa's claim,[29] the court first explained the tortured history of the § 212(c) waiver.[30] As originally

16. 8 C.F.R. § 1212.3(e).

17. De la Rosa v. U.S. Att'y Gen., 579 F.3d 1327, 1328–29 (11th Cir. 2009) (per curiam).

18. "Pretermit" means "to ignore or disregard purposefully." BLACK'S LAW DICTIONARY 559 (8th ed. 2004).

19. *De la Rosa*, 579 F.3d at 1328 (arguing that the BIA's decision in *In re Blake*, 23 I. & N. Dec. 722 (B.I.A. 2005), foreclosed the granting of any waiver).

20. *Id.* at 1328. Jason Schultz, *Immigration Sweep Nets 44 Targeted for Deportation*, PALM BEACH POST, Aug. 25, 2008.

21. *De la Rosa*, 579 F.3d at 1328–29.

22. *Id.*

23. *Id.* at 1329.

24. *Id.* at 1340.

25. *Id.* at 1329.

26. *Id.*

27. *See id.*

28. *Id.* at 1328.

29. Describing De la Rosa's claims as "constitutional and legal in nature," the court determined that it had jurisdiction to review his case. *Id.* at 1328 n.1. Such a finding was necessary in light of the REAL ID Act of 2005, which substantially limited the availability of habeas review of alien removal orders. Jennifer Norako, Comment, *Accuracy or Fairness?: The Meaning of Habeas Corpus After Boumediene v. Bush and Its Implications on Alien Removal Orders*, 58 AM. U. L. REV. 1611, 1621–23 (2009); *see* REAL ID Act of 2005, Pub. L. No. 109-13, § 106(a)(1)(B)(5), 119 Stat. 231 (codified as amended in scattered sections of 8 U.S.C.). Review of alien removal orders by courts of appeals is now limited strictly to constitutional and legal claims and must be sought within thirty days of a BIA decision. Norako, *supra*, at 1621–23. Additionally, courts of appeals are confined to reviewing the administrative record and prohibited from hearing new evidence. *Id.*

30. *De la Rosa*, 579 F.3d at 1329–35.

enacted, relief could be sought only by individuals denied entry into the United States.[31] The statute provided no basis for application to aliens present and facing deportation.[32] This distinction rendered those aliens subject to deportation eligible for a waiver if they first voluntarily left the country, but provided no recourse for aliens actually deported on the basis of identical charges.[33] This disparity did not linger long.[34] Concluding that the statutory distinction was "not rationally related to any legitimate purpose of the statute," the Second Circuit determined in *Francis v. INS*[35] that § 212(c) relief should be available to any alien who otherwise met the statutory criteria,[36] regardless of whether that individual faced deportation or denial of admission.[37] Accepting this constitutional imperative, the BIA formulated the "statutory counterpart" test.[38] Pursuant to this test, a deportable alien was eligible for a waiver if the "ground of deportation charged is also a ground of inadmissibility."[39] This standard eventually was codified at 8 C.F.R. § 1212.3(f)(5) (2004).[40]

Even codified, however, the standard by which § 212(c) waivers applied to deportees remained largely an open question.[41] The BIA previously determined that, pursuant to the regulation, a categorical approach should be employed to determine whether the statutory counterpart test was met.[42] Under this approach, "whether a ground of deportation or removal has a statutory counterpart in the provisions for exclusion or inadmissibility turns on whether Congress has employed similar language to describe substantially equivalent categories of offenses."[43] Notably, to exemplify this standard, the BIA stated:

> Although many firearms offenses may also be crimes of moral turpitude, the category of firearms offenses is not a statutory counterpart to crimes of moral turpitude. Similarly, *although there may be considerable overlap between offenses categorized as sexual abuse of a minor and those considered crimes of moral turpitude, these two categories of offenses*

31. *Id.*; *see also* INA § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996).
32. *De la Rosa*, 579 F.3d at 1329–30; *see also* 8 U.S.C. § 1182(c).
33. *De la Rosa*, 579 F.3d at 1329–30 (quoting Farquharson v. U.S. Att'y Gen., 246 F.3d 1317, 1323 (11th Cir. 2001)).
34. Francis v. INS, 532 F.2d 268, 272 (2d Cir. 1976) (extending § 212(c) relief to deportable aliens regardless of whether they had voluntarily left the United States).
35. 532 F.2d 268, 272 (2d Cir.1976).
36. *See supra* text accompanying note 11.
37. *De la Rosa*, 579 F.3d at 1329–30 (citing *Francis*, 532 F.2d 268 at 272).
38. *Id.* at 1330 (citing *In re* Wadud, 19 I. & N. Dec. 182, 184 (B.I.A. 1984)).
39. *Id.* (quoting *In re* Wadud, 19 I. & N. Dec. at 184).
40. *Id.* at 1330–32.
41. *Id.* at 1333 (summarizing the approaches taken by the Second and Ninth Circuits).
42. *In re* Blake, 23 I. & N. Dec. 722, 728 (B.I.A. 2005).
43. *Id.*

*are not statutory counterparts*.[44]

Following the BIA's decision, the First, Third, Fifth, Sixth, Seventh and Eighth Circuits all adopted the categorical approach.[45]

The Second Circuit did not, however.[46] It fashioned a broad offense-based approach that requires immigration courts to inquire into the deportee's underlying crime to determine whether it could have a statutory counterpart.[47] Essentially, the Second Circuit requires immigration courts to determine whether the petitioner's underlying crime could have been charged in a manner that would entitle him to relief.[48] As noted by the court, this method substantially expands the number of eligible applicants, "open[ing] the door to a torrent of claims."[49]

The Ninth Circuit likewise disagreed, but found fault in both the categorical and offense-based approaches.[50] Rather than expanding eligibility, however, it rejected the *Francis* expansion altogether and determined that § 212(c) relief is per se unavailable to deportees.[51] It reasoned that Congress likely intended the initial distinction to encourage aliens to voluntarily leave the United States rather than be deported, thereby saving government resources.[52] As *De la Rosa* noted, these legal distinctions have resulted in a three-way circuit split, leaving the court with a "menu of options."[53]

Amidst this legal turmoil, De la Rosa waited for the Eleventh Circuit to determine for the first time which standard it would require.[54] He would not get the answer he sought.[55] Refusing "to breathe further life" into what it described as a construct of judicial legislation, the court affirmed the holding of the BIA and unequivocally adopted the categorical standard for resolving the statutory counterpart test.[56] De la Rosa would not benefit

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44. *Id.* (emphasis added).

45. National Immigrant Justice Center, *11th Cir. Adopts Categorical Approach, Rejects § 212(c) Waiver for Sexual Abuse of a Minor, an Aggravated Felony*, Aug. 20, 2009, http://www.immigrantjustice.org/litigationupdate/11thcircuit/11thcirdelarosa.html.

46. Blake v. Carbone, 489 F.3d 88, 104 (2d Cir. 2007) ("Were we to approve of these other courts' formulaic approach-limiting ourselves only to the language in the relevant grounds of deportation and exclusion-we would be ignoring our precedent that requires us to examine the circumstances of the deportable alien, rather than the language Congress used to classify his or her status.").

47. *De la Rosa*, 579 F.3d 1327,1333 (11th Cir. 2009) (per curiam) (citing *Carbone*, 489 F.3d at 103).

48. *Id.* at 1333–34.

49. *Id.* at 1339 (quoting Abede v. Mukasey, 554 F.3d 1203, 1212 (9th Cir. 2009) (Clifton, J., concurring)).

50. *Id.* at 1334–35 (citing *Abede*, 554 F.3d at 1206).

51. *See id.* at 1335.

52. *Id.* at 1334–35.

53. *Id.* at 1335.

54. *Id.* at 1327 ("This case presents us with an issue of first impression in our circuit.").

55. *Id.* at 1328.

56. *Id.* at 1340.

from the Attorney General's discretion—he would not even get the opportunity to plead his case for a waiver.[57]

The basis for this rejection was twofold: a refusal to expand the *Francis* rule and a deference to the BIA's interpretation of its regulations. First, the Eleventh Circuit had parted ways with the Second Circuit's ongoing expansion of eligibility for § 212(c) waivers as far back as 1994.[58] That year, the Eleventh Circuit decided *Rodriguez-Padron v. INS*,[59] in which it "rejected any additional extension of the *Francis* rule."[60] In so holding, the court explicitly considered the Second Circuit's most recent extension of waiver relief—this time to deportees charged with illegal entry.[61] In emphatic terms, the court concluded the Second Circuit's ongoing expansion of relief eligibility lacked any basis in the statutory text and also noted its concern with the Second Circuit's departure from the determinations of the Attorney General.[62]

Expressing a rule of judicial restraint that would reappear consistently in related Eleventh Circuit opinions, the *Rodriguez-Padron* court thereafter distinguished the *Francis* extension from the further expansion requested.[63] The court explained that "[t]he former draws an implication from existing text, while the latter is a clear departure from plain statutory language. In this context, we believe that a statute should be stretched only as far as necessary to prevent unconstitutionality."[64] Additionally, the court concluded that the contrary determinations of the Attorney General and other circuits should have been accorded some measure of deference.[65]

These sentiments resurfaced in 2001 in *Farquharson v. U.S. Attorney*

57. *See id.* at 1340.

58. *See* Rodriguez-Padron v. INS, 13 F.3d 1455, 1457, 1460 (11th Cir. 1994) (describing, in part, the difficulties that had arisen as a result of the multiple judicially-crafted extensions of § 212(c) eligibility and therefore refusing to further extend the availability of such relief).

59. 13 F.3d 1455, 1457 (11th Cir. 1994).

60. *De la Rosa*, 579 F.3d at 1338.

61. *Rodriguez-Padron*, 13 F.3d at 1459–61 (rejecting the rationale of Bedoya-Valencia v. INS, 6 F.3d 891 (2d Cir. 1993) and extending § 212 (c) relief to deportees charged with illegal entry).

62. *Id.* at 1459–61 ("The Second Circuit (unlike the Attorney General . . . and at least two other circuits) was untroubled by the lack of a basis for this extension in the statutory text, observing that 'there has already been a considerable departure from the text' in extending waiver availability to those deportable on analogous grounds.").

63. *Id.* at 1459–60.

64. *Id*. at 1460.

65. *Id.* at 1460–61; *see also* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (requiring courts to accord deference to agency determinations in delineated circumstances). The *Chevron* doctrine requires courts reviewing agency interpretations of a statute to first determine "whether Congress has clearly spoken to the issue at hand." J.C. Van Lierop III, Note, *Post-9/11 Army Disability Decisions: Reinforcing Administrative Law Principles in Fitness and Disability Rating Determinations*, 61 FLA. L. REV. 639, 651–52 (2009). If so, courts must yield to congressional intent, which can be gleaned from statutory text or, if ambiguous, legislative history. *Id.* Absent such intent, the Court concluded that implicit interpretative authority is reserved in the pertinent agency. *Id.* Courts must therefore defer to such interpretations that are reasonable and not "arbitrary and capricious." *Id*. at 652.

*General* when the Eleventh Circuit refused to expand § 212(c) relief to those charged with illegal-entry related crimes[66]—the very extension granted by the Second Circuit eight years prior.[67] In reaffirming its refusal to broaden *Francis*, the court explicitly described its "aversion to 'stretch[ing] [§ 212(c)] beyond its language' . . . and observed that 'further judicial redrafting would serve only to pull the statute further from its moorings in the legislative will.' "[68]

Given such decidedly-critical precedent, the court's refusal to adopt the Second Circuit's most recent expansion—the offense-based standard—could certainly be expected.[69] Other than *Francis*, from which the Eleventh Circuit has never receded, no extension of § 212(c) waiver relief has met the Eleventh Circuit's approval.[70]

Standing alone, this reluctance to step beyond the line drawn by *Francis* would explain and support the court's most recent refusal to "breathe further life" into § 212(c) relief.[71] It bears noting, however, that each of the described refusals was made in the absence of any codified standard.[72] In 2004, the statutory counterpart test was codified at 8 C.F.R. § 1212.3(f)(5), which stated that "an application for relief under § 212(c) must be denied if '[t]he alien is deportable under section 241 of the Act or removable under section 237 of the Act on a ground which does not have a statutory counterpart in section 212 of the Act.' "[73] The following year, the BIA interpreted the newly codified test as requiring a categorical approach to determining eligibility.[74]

Deference to this agency interpretation of the regulation is therefore the second rationale for the *De la Rosa* outcome.[75] As described previously, the Eleventh Circuit has not refrained from criticizing a perceived lack of deference by the Second Circuit to BIA determinations.[76] Such deference is required by the *Chevron* doctrine,[77] which requires courts to defer to agency interpretations that are not "arbitrary, capricious, or manifestly contrary to the statute."[78] Of course, this deference is not absolute.[79] Courts

66. 246 F.3d 1317, 1325 (11th Cir. 2001).

67. Bedoya-Valencia v. INS, 6 F.3d 891, 897 (2d Cir. 1993).

68. De la Rosa v. U.S. Att'y Gen., 579 F.3d 1327, 1338 (11th Cir. 2009) (per curiam) (quoting *Farquharson*, 246 F.3d at 1325).

69. *Id.* at 1338 ("In our view, we parted ways with the Second Circuit [long ago] . . . .").

70. *Id.* ("Although we consistently signaled our view that any additional extension of § 212(c) beyond *Frances* is 'not constitutionally required,' we stress that we have in no way abandoned our adoption of the equal protection rationale of *Francis* itself.").

71. *Id.* at 1340.

72. *See Farquharson*, 246 F.3d at 1322-23; Rodriguez-Padron v. INS, 13 F.3d 1455, 1459–61 (11th Cir. 1994).

73. *De la Rosa*, 579 F.3d at 1332 (quoting 8 C.F.R. § 1212.3(f)(5) (2008)).

74. *Id.* at 1332–33 (citing *In re Blake*, 23 I. & N. Dec. 722, 728 (BIA 2005)).

75. *Id.* at 1339–40.

76. *Rodriguez-Padron*, 13 F.3d at 1460–61.

77. *See id.*

78. *See* Dustin G. Hall, Note, *The Elephant in the Room: Dangers of Hedge Funds in Our*

cannot abdicate their responsibility to "say what the law is," and thus have the right even under *Chevron* to review BIA interpretations to ensure they comply with congressional intent.[80]

Undertaking this inquiry, the court concluded that the plain language of the statute supported a limited categorical inquiry and gave no indication that Congress intended the underlying crime for which a petitioner was convicted to play any role in the inquiry.[81] In fact, the court found that to allow courts to look beyond the charged grounds of deportation to determine whether a criminal offense *could* have been treated as a crime of moral turpitude would greatly expand the role Congress assigned the judiciary in immigration cases.[82]

The Third Circuit's rationale in *Caroleo v. Gonzales* supports the Eleventh Circuit's conclusion.[83] That court opined that if Congress intended courts to investigate whether a charged crime had underlying attributes that could coincide with an eligible category, it plainly could have done so.[84] The court identified 8 U.S.C. § 237, wherein Congress explicitly required that "courts look to an alien's *underlying criminal conviction* to determine eligibility" for removal, as an example.[85] Noting the absence of similar language in the § 212(c) construct, the Third Circuit refused to credit the petitioner's argument that his conviction for attempted murder be considered a crime involving moral turpitude.[86]

In addition to this textual distinction, the *De la Rosa* court noted that the practical effect of employing the offense-based standard sought by De la Rosa would be akin to sentencing a criminal defendant along the sentencing range required by the least serious crime with which he could have been charged–~~a~~ concept the court considered clearly untenable.[87] The court thus concluded the BIA's interpretation fell well within the scope of reasonableness and, therefore, required due deference.[88] Affirming the decision of the BIA, the court declined to give De la Rosa the opportunity

*Financial Markets*, 60 FLA. L. REV. 183, 203 (2008) (explaining the *Chevron* doctrine's two-step process).

79. David A. Karp, Comment, *Setting the "Persecutor Bar" for Political Asylum After* Negusie, 61 FLA. L. REV. 933, 935–36 (2009) ("The complexity of Negusie's case, which presented questions of foreign affairs, international law, and Congress' plenary immigration power, illustrates why courts so often ask the political branches to settle these types of policy issues.").

80. *Id.*

81. *De la Rosa*, 579 F.3d 1327, 1339 (11th Cir. 2009) (per curiam) (citing Caroleo v. Gonzales, 476 F.3d 158, 168 (3d Cir. 2007)).

82. *Id.* at 1339 (quoting Zamora-Mallari v. Mukasey, 514 F.3d 679, 692 (7th Cir. 2007) (concluding alien convicted of criminal sexual abuse of a child was ineligible for relief)).

83. 476 F.3d at 164–68 (adhering to the categorical approach).

84. *De la Rosa*, 579 F.3d at 1339 (citing *Caroleo*, 476 F.3d at 160–64, 168).

85. *Id.* (quoting *Caroleo*, 476 F.3d at 164).

86. *Id.* (citing *Caroleo*, 476 F.3d at 164–68).

87. *Id.* at 1339–40 (quoting Abebe v. Mukasey, 554 F.3d 1203, 1212 (9th Cir. 2009)).

88. *See id.* at 1339.

on which he depended.[89]

Though the Eleventh Circuit eventually ruled against him, De la Rosa had good cause to appeal. In the absence of controlling precedent, he sought to convince the court to adopt the Second Circuit's offense-based approach[90]—an approach under which he would be eligible for relief.[91] Practically speaking, he risked nothing with his challenge.[92] If successful, however, he had much to gain: a possible waiver of deportation.

Still, De la Rosa's gamble was a long shot. In each of its decisions regarding the eligibility of deportable aliens to § 212(c) relief, the Eleventh Circuit had exercised judicial restraint, refusing to cross beyond the *Francis* line.[93] In *De la Rosa*, this would not change.[94] Instead, the court reiterated its aversion to the judicial extension of a statute without sufficient constitutional justification and warned that even an initial extension does not empower courts to extend a statute ad infinitum.[95] Specfically, the court explained:

> When a rule, born of a series of *ad hoc* judicial extensions to a statute, no longer bears any passing resemblance to its parent legislation, that rule is a creature of judicial legislation. We decline to breathe further life into such a construct and hew to the maxim that courts are charged with adjudication, not legislation.[96]

Without question, by electing to "guard against the temptation to cherry-pick those portions [of law] along the continuum that [it] might find appealing or convenient . . . ," the Eleventh Circuit abided by Congress' express intent and reaffirmed the proper role of the judiciary—to adjudicate, not legislate.[97]

89. *Id*. at 1340.
90. *Id*. at 1337.
91. *See* Blake v. Carbone, 489 F.3d 88, 104 (2d Cir. 2007) (remanding to the BIA to determine whether charges for sexual abuse of a minor necessarily constituted a crime involving moral turpitude).
92. Given the Eleventh Circuit's ongoing affirmation of *Francis*, it is inconceivable that the court would elect to adopt the Ninth Circuit's blanket prohibition. *See De la Rosa*, 579 F.3d at 1335, 1337 n.14.
93. *Id.* at 1337–38.
94. *Id.* at 1340.
95. *Id.*
96. *Id.*
97. *Id*.